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Nos. 81-2245, 81-2276, 82-38

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

STATE OF NEVADA,
Petitioner,
v.
UNITED STATES OF AMERICA, et al.,
Respondents.

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,
v.
UNITED STATES OF AMERICA, and
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondents.

PYRAMID LAKE PAIUTE TRIBE
Cross-Petitioner,
v.
TRUCKEE-CARSON IRRIGATION DISTRICT,
et al.,
Cross-Respondent

On Petitions for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

# BRIEF OF THE HOOPA VALLEY TRIBE, MAKAH INDIAN TRIBE AND SUQUAMISH INDIAN TRIBE AS AMICUS CURIAE IN SUPPORT OF PYRAMID LAKE PAIUTE TRIBE OF INDIANS

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The amicus curiae identified below file this amicus brief with the consent

of all parties as provided by the rules of this Court.

THE INTEREST OF THE AMICI CURIAE

The Hoopa Valley Tribe, the Makah Indian Tribe and the Suquamish Indian Tribe are federally recognized tribes with extensive dealings with the United States. They have, at various times, been represented by the United States in litigation or have participated as co-parties with the United States. They, like most Indian tribes, are deeply concerned by the issues of breach of trust responsibility that are raised by this case and by the impact that breaches of fiduciary responsibility by the United States have on the doctrine of res judicata as it applies to tribal rights.

The Makah Indian Tribe and Suquamish Indian Tribe are located in the State of

Washington, and the Hoopa Valley Tribe is located in the State of California.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Truckee-Carson Irrigation District (hereinafter referred to as "TCID") asserts that the Pyramid Lake Paiute Tribe of Indians (hereinafter referred to as "Tribe") and the Newlands Reclamation Project (hereinafter referred to as "Newlands") were "adverse in fact" during the Orr Ditch litigation and that principles of res judicata therefore preclude the Tribe from litigating the Tribe's right to sufficient water to preserve the Pyramid Lake fishery. TCID makes this assertion even though in the Orr Ditch litigation neither the Tribe nor Newlands were named parties, and the United States purported to represent both.

This amicus brief is written in support of the Court of Appeals' decision rejecting TCID's res judicata defense.

The relevant facts are set out fully in the Tribe's brief. The central fact, it appears to the amici tribes, is that the United States purported to represent the interests of both the Tribe and the Newlands Project's water users in Orr Ditch. Since the primary purpose of the Orr Ditch litigation was to ascertain how much water could be diverted for the Newlands Project (TCID Brief at 29, Pyramid Lake Brief at 8), not to secure adequate water for the reservation, it is equally clear that that United States failed to provide adequate representation for the Tribe. The Tribe was never informed of its attorney's conflict of interest, and as the Tribe's brief explains more fully, the United States assured the Tribe that

it was not the intent of the United States to litigate the Tribe's water right for fishery purposes.

The United States' attempt to represent both Newlands and the Tribe was improper because their interests were adverse and the United States could not adequately represent both. The Tribe was, therefore, a denied a fair hearing - the essence of procedural due process. The failure of the United States to adequately represent the Tribe in Orr Ditch means that in any meaningful sense neither the Tribe nor the issues relevant to the Tribe were properly before the court. The United States' impermissible and unseemly conflict of intent in Orr Ditch mandates this Court's affirmation of the Court of Appeals' decision to the extent that decision held that the Tribe is not precluded from litigating, for the first

time, its Winters water right to sufficient water to support the reservation fishery. Winters v. United States, 207 U.S. 564 (1908).

The correctness of the decision below is highlighted by the primary argument advanced by TCID - that its predecessor in interest, Newlands, and the Tribe were adverse in the Orr Ditch litigation. (TCID Brief at 23.) The adversity averred by TCID is used to support TCID's contention that the Tribe is barred from litigating its water rights now. TCID maintains that the United States had no separate interest in Orr Ditch but represented the beneficial interests of Newlands and the Tribe. We are led by TCID to believe that parties to adjudications (such as Orr Ditch) "have a commensurate incentive to maximize each of their claims and to vigorously contest all claims with earlier priorities."

(TCID Brief at 28, emphasis in original.)

TCID's claim succeeds only in affirming that the Tribe was not adequately represented in Orr Ditch and, therefore, cannot be bound. When two adverse parties are represented by one attorney there can be no "vigorously" contested claim. In Orr Ditch, the United States was not only placed in an untenable conflict initially, it carried that conflict into the litigation. Since water reserved for the Tribe reduced the amount ultimately available to Newlands, there was every incentive to diminish the Tribe's claim and advance Newland's claim. The ultimate water right adjudicated for the Tribe in Orr Ditch bears out the obvious inequity of that proceeding. See the Tribe's brief on the merits.

In Orr Ditch the United States also clearly violated the special trust responsibility that it owes to the Pyramid Lake Tribe as well as to all other Indian tribes. Consistent with that obligation, the United States cannot compromise the rights of an Indian tribe in order to advance other competing interests. It requires the United States to provide the Tribe its undivided loyalty in any judicial proceeding where the interests of the Tribe are at stake.

The Tribe depended on the good faith representation of its fiduciary and the United States failed to meet the high standards imposed by that trust. Application of res judicata would sanction the malfeasance of the United States and would allow Newlands, the Tribe's "co-non-party plaintiff" in Orr Ditch to re-

ceive the windfall benefits from the United States' breach of trust.

## ARGUMENT

### I. THE NATURE AND INADEQUACY OF THE UNITED STATES' REPRESENTATION OF THE PYRAMID LAKE TRIBE IN ORR DITCH PRECLUDES THE APPLICATION OF THE DOCTRINE OF RES JUDICATA.

#### A. Nature of the Trust Duty of the United States to Indian Tribes.

The relationship between the United States and Indian tribes in the United States was first articulated by this Court in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). There this Court stated that the relationship between Indians and the United States "is perhaps unlike that of any other two people in existence," 30 U.S. at 17, "resembl[ing] that of a ward to his guardian." Id. at 18. As this Court more fully articulated in United States v. Kagama, 118 U.S. 375, 383-84 (1886):

> These Indians are the wards of the nation. They are communities dependent on the United States.... From their very weakness and helplessness.... there rises a duty of protection, and with it the power.

Kagama affirmed the power of the Congress to legislate on behalf of Indians, but more importantly, recognized a special duty of care and protection owed by the United States to tribes.

Again in 1941, this Court affirmed the trust doctrine in Seminole Nation v. United States, 316 U.S. 286, 296-97 (1941):

> Under a humane and self-imposed policy which has found expression in many act of Congress and numerous decisions of this Court, [the United States] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

This common law trust doctrine first articulated by Chief Justice Marshall has been confirmed time and again by Congress. Indeed, Congress recognized its special responsibility to Indian tribes even before Justice Marshall's landmark decision. The Northwest Ordinance of 1787, 1 Stat. 50, established the basic relationship between the government and Indian tribes:

> .... The utmost good faith shall always be observed toward the Indians; their land and property shall never be taken from them without their consent; their property, rights, and liberty, they never shall be invaded or disturbed....

The Indian Reorganization Act of June 18, 1934, 25 U.S.C. §§ 461 et seq., confirmed the independence and governmental status of Indian tribes and marshalled the resources of the United States to preserve and protect those governmental

interests. Indeed, section 16 of the Indian Reorganization Act, 25 U.S.C. § 476, precludes the sale or disposition of Tribal land, any interest in land, or other tribal assets without the prior consent of the Tribe affected, an admonition clearly violated by the United States in Orr Ditch.

In the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq., Congress affirmed

> that Congress, through statutes, treaties and the general course of dealings with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources....

See also, the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301, and Indian Self-Determination and Education Assistance Act of 1965, 25 U.S.C. §§ 450-450w.

It is for this Court now to determine whether the United States complied with exacting fiduciary standards when it allowed itself to represent both the Pyramid Lake Tribe and the Newlands Reclamation Project in Orr Ditch. If the United States' goal was to advance the Newlands Project, it could not have, and quite obviously did not, act as the fiduciary to Pyramid Lake Tribe.

The trust responsibility of the United States requires it to administer the trust property solely in the interest of the Tribes. See Restatement (Second) of Trusts § 170, comment q, observing that a trustee may not be guided by the interests of any third party.

Nor is the Tribe in a similar position to agencies of the United States, as TCID asserts. See TCID Brief at 33. Indian tribes are separate governments, not

part of the federal government. They do not owe their existence to the United States, nor do they derive their power from the federal government. See generally, United States v. Wheeler, 435 U.S. 313 (1978). While the United States may be able to compromise issues within the federal family of departments and agencies, it is not in a position to compromise the rights of an Indian tribe in a proceeding where the United States purports to represent its interests.

In Chippewa Indians of Minnesota v. United States, 301 U.S. 358 (1937), this Court elaborated as follows:

> Our decisions, while recognizing that the government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare, show that this power is subject to Constitutional limitations and does not enable the goverment to give the lands of one tribe or band to another or to deal with them as its own.

301 U.S. at 375-76.

This rationale has been followed by other courts. In Navajo Tribe v. United States, 364 F.2d 320 (Ct. Cl. 1966), the Navajo Tribe brought an action contesting the right of the United States Bureau of Mines to extract helium from the reservation and appropriate the proceeds to itself rather than to the Tribe. The Court held, as the Tribe asserted, that the proceeds should have been credited to the Tribe and not the United States. In discussing the duty of the United States to the tribes the Court of Claims stated "that the case is somewhat analagous to that of a fiduciary who learns of an opportunity, prevents the beneficiary from getting it, and seizes it for himself." 364 F.2d at 324.

The Court of Appeals correctly denied to TCID the defense of res judicata. In Orr Ditch the representation of the Tribe by the United States was so inadequate that the Tribe cannot properly be considered to have been before the court; the United States quite literally appropriated the interests of the Tribe and transferred them to the Newlands Project.

To assert that res judicata now binds the Tribe when the United States has acted with utter disregard for tribal interests, would deprive the Pyramid Lake Tribe of any meaningful opportunity to have its rights fairly determined.

### B. The Executive Branch Does Not Have Authority to Compromise the Legal Interests of Indian Tribes.

Although this Court has recognized Congress' authority to administer Indian

affairs, United States v. Kagama, 118 U.S. 375 (1885), Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), even its authority and management of tribes are not absolute. E.g., Delaware Business Community v. Weeks, 430 U.S. 763 (1977). And Congressional action will not be held to modify or adjust Indian rights, unless Congress expressly indicates its intention to do so. Menominee Tribe v. United States, 391 U.S. 404 (1968). This Court has long interpreted Congressional actions in favor of preserving the special relationship of the United States toward Indian tribes. Thus, special canons of construction have evolved that seek to ensure that rights of Indian tribes are not lightly or inadvertently destroyed. See, e.g., Menominee, supra; Bryan v. Itasca County, 426 U.S. 373 (1976).

The Executive, of course, is even more limited in how it can affect Indian rights. Plenary power over Indian Tribes lies with Congress; executive action must be consistent with legislative direction from Congress. When Congress acts through legislation to give direction to the Executive, it may make policy decisions on how to protect the interests of the Tribes in light of other federal priorities. But Congress has not authorized the Attorney General to compromise Indian water rights in litigation involving other competing federal interests.

The Reclamation Act of 1902 is the single statute that might have been interpreted as giving the Executive Branch power to compromise Indian water rights claims. But in California v. United States, 438 U.S. 645 (1970), this Court held that Section 8 of the Reclamation

Act, 43 U.S.C. § 372, prevented the Secretary from extinguishing Indian water rights for the benefit of the Reclamation Project. The Attorney General, therefore, had no authority to compromise the right of the Tribe.

C. The Action of the United States In Orr Ditch Violated the Canons of Professional Conduct Which Must Guide Attorneys Representing Clients Before the Court.

Since the United States purported to represent the Pyramid Lake Tribe in the Orr Ditch proceedings, the United States owed a duty to the Tribe at least equal to that owed a client by any attorney. Canon 5 of the Code of Professional Responsibility provides: "A lawyer should exercise independent professional judg-

ment on behalf of a client."[1] The ethical consideration following Canon 5 makes it clear that the judgment of a lawyer must be exercised solely for the benefit of his client free from compromising influences or loyalties. EC 5-1. The Canons speak directly to the duty of the lawyer involved in litigation with multiple clients:

> A lawyer should never represent in litigation multiple clients with differing interests; and, there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests.

EC 5-15. TCID insists that this Court find that the Tribe and Newlands were, in fact, adverse. It apparently fails to realize that such a finding by definition mandates the conclusion that the United

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1. References are to the 1980 edition of the ABA Model Code of Professional Responsibility.

State could not, consistent with the Canons of Professional Responsibility, adequately represent both Newlands and the Tribe. The Tribe, therefore, cannot now be held to have been "represented" in the Orr Ditch proceeding.[2]

The Canons do recognize an exception to the rule against representing multiple parties, found in DR 5-105(C):

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2. The conflict in Orr Ditch was so extreme it is difficult to find parallel cases. Wicks v. Central Railroad Company, 296 A.2d 649 (1971), addressed the question of whether a single attorney could represent both a fireman and an engineer claiming injuries from a train derailment. The court held since the fireman and engineer may have cross-claims against each other, a single attorney was not appropriate. Similarly, in Rice v. Baron, 456 F. Supp. 1351 (S.D.N.Y. 1978), the court held that it was improper for a single attorney to represent both the plaintiff and cross-claim defendant since the issue of indemnification would possibly make the two clients adversaries. In Orr Ditch there existed no conceivable ground that would justify the United States' simultaneous representation of Newlands and the Tribe.

> [A] lawyer may continue if it is obvious that he can adequately represent the interests of each, and if each consents to the representation after full disclosure of the possible effects of such representation.

But Newlands and the Tribe had claims for amounts of water which were necessarily in conflict because of the limited supply of water. Moreover, the United States never explained to the Tribe the potential ramifications of this dual representation. Rather, it bent over backwards to assure the Tribe that its interests were going to be protected; it assured the Tribe that the Tribe's critical fisheries interests were not part of the litigation.

In sum, TCID's claim that those breaches of fiduciary and professional duties should be ignored should not be accepted.

## CONCLUSION

The United States' trust responsibility toward Indian tribes requires that the United States exercise the highest fiduciary duty and when it undertakes to represent Indian interests, to faithfully represent the tribe and not unilaterally compromise the tribal rights. It is beyond cavil that the United States violated those high standards in the Orr Ditch proceedings. Tribal interests and water rights, as they relate to the reservation fisheries, were not litigated nor were they adequately protected in that adjudication, and the Tribe never received a fair hearing on those issues. Res judicata cannot now be utilized by the successors in interest to one "non-party plaintiff" (Newlands) represented by the United States, to deny to the Pyramid Lake Indian Tribe their day in court.

The Amicus tribes respectfully suggest that this Court should affirm the decision of the Ninth Circuit Court of Appeals to the extent that it denies to TCID the defense of res judicata.

Respectfully submitted,

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## QUESTION PRESENTED

Whether the alleged lack of due process bars application of the principles of *res judicata* to the Pyramid Lake Paiute Tribe of Indians' claim for additional federally reserved water rights.

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## INTEREST OF *AMICI*

The public agencies joining in this *amicus* brief presently are parties to proceedings initiated on motions filed by five Indian Tribes[1] and the United States in 1977 and 1978 to reopen proceedings in *Arizona v. California* (No. 8 Orig., October Term 1982). A major issue in these proceedings is whether the principles of *res judicata* should bar the Tribes and the United States from relitigating the magnitude of the Tribes' reserved water rights which were determined by this Court in its decision, *Arizona v. California*, 373 U.S. 546 (1963), and incorporated in the decree issued thereunder, 376 U.S. 340 (1964).

The Special Master, assigned this matter, determined that Article IX of the 1964 decree provides a vehicle for this Court to reach the merits of the claims of the Tribes and the United States for additional reserved water rights. (Report of Elbert P. Tuttle, Special Master, at pages 54-55, hereinafter "Tuttle Report".) He found it unnecessary to consider arguments raised by the Tribes that due process prevented application of *res judicata* to their additional claim based upon an alleged conflict of interest and breach of fiduciary duty allegedly impairing the United States' representation of the Tribes in the prior proceeding. (Tuttle Report, at page 54, n.71.)

At the December 8, 1982 oral argument before this Court on the Special Master's Report, the Court indicated an interest in the procedure that could be followed if it were necessary to determine the conflict of interest issue. (Official Transcript, at 26.) *Amici* contend that proof of a conflict of interest would not destroy the preclusive

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[1] The five tribes are the Colorado River, Chemeheuvi, Cocopah, Fort Mojave and Quechen Tribe of Fort Yuma Indian Reservation.

effect of the prior decree (Official Transcript at page 26) and therefore would not necessitate consideration of such claim on remand to the Special Master.[2]

As *amici* have asserted throughout the proceedings in *Arizona v. California,* the appropriate forum for consideration of the conflict of interest allegations raised by the Tribes is the United States Court of Claims in an action for monetary damages arising from a breach of trust. (Exceptions of the States of Arizona, California and Nevada and Other California Defendants to the Report of Special Master Elbert B. Tuttle; and Brief of Said Parties in Support of Exceptions, at pages 53–55.)

In the instant proceeding, the Pyramid Lake Paiute Tribe of Indians' ("the Tribe") additional claim for reserved water rights rests on a conflict of interest allegation similar to that advanced by the Tribes in *Arizona v. California.* The Tribe thus contends, as did the Tribes in *Arizona v. California,* that due process concerns override the principles of *res judicata* and permit relitigation of the Tribe's reserved water rights. (Brief of Cross-Petitioner Pyramid Lake Paiute Tribe of Indians at pages 37–43.)

Because of the Court's concern with a similar issue in *Arizona v. California, amici* have filed this brief in opposition to Cross-Petitioner Pyramid Lake Paiute Tribe of Indians and urge the Court to accord the Orr Ditch decree finality under the principles of *res judicata.*

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[2] *Amici* note that this position disagrees with the response of counsel at oral argument. (Official Transcript, at 26.)

## SUMMARY OF ARGUMENT

The controlling principle of law in the instant case is *res judicata.* Having had its reserved water rights claim litigated in the prior proceeding, through representation by the United States, *Heckman v. United States,* 224 U.S. 413 (1912), the Tribe must now be precluded from relitigating that claim. Any other result would be violative of the most fundamental principles of *res judicata,* impair the due process rights of the other parties to the Orr Ditch decree, and call into question the validity and finality of numerous western water rights adjudications.

The Tribe's contention that *res judicata* preclusion of its claim for additional reserved water rights will violate its due process rights is totally without merit. Due process claims based on alleged conflicts of interest, breach of trust or inadequate representation of an Indian Tribe by the United States in a prior proceeding are appropriately addressed in the United States Court of Claims through an action for money damages. *United States v. Mitchell,* 445 U.S. 535, *rehearing denied,* 446 U.S. 992 (1980); *decision on remand,* 664 F.2d 265 (Ct. Cl. 1981), *cert. granted,* ___ U.S. ___, 73 L. Ed. 2d 1312 (1982). Significantly, the Tribe has availed itself of this remedy by successfully settling a money damages action against the United States in the Indian Claims Commission, discussed, *infra,* at pages 8-10.

With respect to pending water rights adjudications, should an Indian Tribe raise a conflict of interest/due process claim, it may, for good cause, request substitution of independent counsel in lieu of the traditional representation by the United States. This procedure, indeed, was followed by the Ninth Circuit Court of Appeals in the proceedings below. *United States v. Truckee-Carson Irrigation District, etc.,* 649 F.2d 1286,

*modified*, 666 F.2d 351 (9th Cir. 1982); *Accord, New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976), *cert. denied sub nom. New Mexico v. United States*, 429 U.S. 1121 (1977).

For these reasons, *amici* believe the Court should bar relitigation of the Tribe's claim for additional reserved water rights and accord *res judicata* effect to the Orr Ditch decree.

## ARGUMENT

### THE ALLEGED LACK OF DUE PROCESS DOES NOT BAR APPLICATION OF THE PRINCIPLES OF *RES JUDICATA* TO THE PYRAMID LAKE PAIUTE TRIBE OF INDIANS' CLAIM FOR ADDITIONAL FEDERALLY RESERVED WATER RIGHTS.

The Pyramid Lake Paiute Tribe of Indians ("the Tribe") advances two alternative legal theories in support of its contention that it should be permitted to relitigate the quantum of its federally reserved water rights. First, the Tribe asserts that its present claim for a fishery water right was not part of the Orr Ditch cause of action, but is a new, distinct claim not previously litigated. (Brief of Cross-Petitioner Pyramid Lake Paiute Tribe of Indians, at pages 18-37, hereinafter referred to as "Tribe's Brief".) As the Court of Appeals correctly determined, however, this contention is totally without merit. The complaint filed in the prior Orr Ditch proceeding was drafted in "comprehensive terms" and plainly indicated the United States' intent to adjudicate all federally reserved water rights, including those due the Tribe. *United States v. Truckee-Carson Irrigation District, etc.*, 649 F.2d 1286, 1302 (9th Cir. 1981), *modified*, 666 F.2d 351 (9th Cir. 1982).

Although the Tribe disputes the validity of this determination, it nonetheless advances an alternative argument in support of its fishery water right claim. Specifically, the Tribe alleges that preclusion of its claim on grounds of *res judicata* would result in a denial of the Tribe's due process rights. (Tribe's Brief at page 38, *et seq.*) To support this theory, the Tribe argues that the United States had a conflict of interest in the prior proceeding which resulted in a breach of its fiduciary duty to the Tribe and unlawfully impaired the Tribe's opportunity for a full and fair hearing on the question of its reserved rights. The Tribe relies on decisions of this Court which establish that procedural due process cannot be satisfied merely by providing notice to a nominal trustee who represents conflicting interests that the property rights of the underlying beneficiary are subject to final adjudication. Principal reliance is placed on *Hansberry v. Lee*, 311 U.S. 32 (1940), and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Both *Hansberry* and *Mullane* are distinguishable from the case at bar, however, in one critical respect. In those cases, neither of which concerned the special trust relationship between the United States and Indian Tribes, *Heckman v. United States*, 224 U.S. 413 (1912), *res judicata* preclusion of the asserted right would have completely deprived the claimant of that right with no meaningful opportunity for a hearing nor any alternative avenue for redressing its rights. In the instant proceeding, however, application of *res judicata* will not have such a draconian effect. The Tribe had the option (and indeed has utilized the option) of redressing the harm allegedly done to its fishery water right by filing a suit in the United States Court of Claims for money damages arising from a breach of trust by the United States. The Court's decision in *United States v. Mitchell*, 445 U.S. 535, *rehearing denied*, 446 U.S. 992

(1980), supports *amici*'s contention that this is the appropriate means for resolving property right interests and breach of trust questions comparable to those raised by the Tribe in the present proceeding.

In *Mitchell,* money damages were sought by individual Indians and by the Tribe for alleged mismanagement by the United States of timber resources on certain allotted lands. This Court ruled that the General Allotment Act of 1887, 25 U.S.C. §§ 331 *et seq.*, does not impose a fiduciary duty on the United States to manage timber resources and therefore no action could lie. It then stated (*id.* at 542):

> We need not consider whether, had Congress actually intended the General Allotment Act to impose upon the Government all fiduciary duties ordinarily placed by equity upon a trustee, the Act would constitute a waiver of sovereign immunity. We conclude that the Act created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources.

On remand, the Court of Claims determined that other statutes under which the Indians had asserted damages did create a fiduciary duty on the part of the United States to manage forest lands. Upon proof of the breach of these responsibilities, the Court ruled that the Indians would have a claim for money damages under 28 U.S.C. § 1505. *Mitchell v. United States,* 664 F.2d 265 (Ct. Cl. 1981), *cert. granted,* ___ U.S. ___, 73 L. Ed. 2d 1312 (1982). Similarly, in *Moose v. United States,* 674 F.2d 1277 (9th Cir. 1982), the Ninth Circuit Court of Appeals ruled that Section 6 of the Southern Paiute Distribution Act, Pub. L. 90-584, 82 Stat. 1147, created a trust relationship between the United States and minor members of the Southern Paiute Tribe and "consequently . . . the

United States has waived sovereign immunity with respect to claims for damages for breach of that trust." 674 F.2d at 1283. *Cf. Gila River Pima-Maricopa Indian Community v. United States,* 684 F.2d 852 (Ct. Cl. 1982).

The *Mitchell* and *Moose* cases are directly on point and, indeed, the rationale provided by these cases has been employed by the Tribe in a money damages action finally adjudicated before the Indian Claims Commission.[3] In that proceeding, the Tribe was awarded $8,000,000 by the Indian Claims Commission "for damages suffered as the result of its not having received all of the water to which it was entitled under rights reserved for the Pyramid Lake Indian Reservation." *Pyramid Lake Paiute Tribe v. United States,* 36 Ind. Cl. Comm. 256 (1975). Amazingly, the Tribe would now have this Court believe that the Indian Claims Commission proceeding is irrelevant to its present claim for a fishery water right because of several provisions included in the stipulation signed by the parties to the proceeding. One of these provisions provides that the Tribe "did not sue here [*i.e.*, the Indian Claims Commission suit] for damages or compensation for the loss, diminution, or taking of any such reserved water rights . . . ." *Pyramid Lake Paiute Tribe v. United States, supra,* 36 Ind. Cl. Comm. at 259-260.[4] The second provision is a specific covenant by the Tribe in which

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[3] Jurisdiction of the Indian Claims Commission has been transferred to the U.S. Court of Claims. 25 U.S.C. § 70v.

[4] *Amici* have difficulty reconciling the language of this covenant with the Indian Claims Commission's statement that the $8,000,000 award was "for damages suffered as the result of [the Tribe's] not having received all of the water to which it was

[footnote continued]

> [T]he Tribe covenants, should it be finally judicially determined that, by reason of acts or omissions of the United States done or occurring prior to the date of execution hereof, water rights once reserved for the Pyramid Lake Indian Reservation were lost, taken, subordinated to other rights, or otherwise diminished, that it [the Tribe] will not again sue the United States to recover additional damages or sue for compensation for the loss, taking, subordination or diminution of such water rights.

Stipulation for Entry of Final Judgment, Numbered Paragraph 9, reprinted at 36 Ind. Cl. Comm. 261.

By this covenant, the Tribe expressly waived its right to seek money damages for diminution to or loss of its reserved water rights resulting from any United States' conflict of interest or breach of trust in the prior proceeding. In short, the Tribe elected to accept $8,000,000 as full payment and satisfaction of any claims it might have against the United States. In reality, therefore, what the Tribe seeks to accomplish through its due process argument in the instant proceeding is to place the burden of its decision to waive further rights or claims for money damages against the United States on all other parties who have relied on the Orr Ditch decree. *Amici* submit that there is no rational basis in law or equity whereby this type of "transfer of liability" can be countenanced by the Court consistent with the due process rights of *all* parties and the principles of *res judicata*. In short, the Pyramid Lake Paiute Tribe of

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entitled. . . ." 36 Ind. Cl. Comm. at 256. It seems likely that the covenant was no more than a thinly veiled attempt by the Tribe and the United States to bolster the Tribe's due process claim to additional reserved rights made in the present proceeding, which was ongoing at the time of the Indian Claims Commission's decision.

Indians has already exercised appropriate procedures to protect its due process rights and has elected to limit satisfaction of its claims thereunder to the $8,000,000 damage award granted by the Indian Claims Commission in 1975. In the face of that election, it would be violative of the most fundamental principles of *res judicata* to place the burden of the Tribes' voluntary decision to waive further claims against the United States for its representation of the Tribe in the prior proceeding on the other Orr Ditch parties.

With respect to pending or future proceedings, it is clear that due process concerns arising from alleged conflicts of interest and breach of fiduciary issues similar to those raised by the Tribe in the present proceeding can be avoided, upon an appropriate showing of need for independent representation, by permitting the Tribe to substitute its independent legal counsel for representation traditionally undertaken by the United States. Several courts have permitted this approach, including the Ninth Circuit in the decision below. *United States v. Truckee-Carson Irrigation District, etc., supra,* 649 F.2d at 1301; *Accord, New Mexico v. Aamodt, supra,* 537 F.2d at 1106.[5]

## CONCLUSION

It is clear that any impairment of the Tribe's reserved rights which may have occurred as a result of the United States' alleged conflict of interest in the prior proceeding could have been addressed to the Court of Claims in an

[5] Where a state is involved in such proceedings, as in *Arizona v. California, supra,* presumably a court, pursuant to its equity powers, would find that a state's sovereign immunity *vis-a-vis* an Indian Tribe would be superseded when the Tribe is standing in the shoes of its disqualified trustee.

action for money damages arising from breach of trust. The Tribe voluntarily waived this right, however, by its decision to limit its claims against the United States to $8,000,000. This voluntary decision to limit its relief against the United States does not enlarge the Tribe's due process rights or provide grounds for removing the *res judicata* effect of the prior proceeding. Accordingly, this Court should hold that the doctrine of *res judicata* precludes consideration of the Tribe's claim for a fishery water right.

Respectfully submitted,

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